Filed 1/11/05 In re Jessica C. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re JESSICA C., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. JESSICA C., Defendant and Appellant.	B173889 (Los Angeles County Super. Ct. No. TJ13880)

APPEAL from an order of wardship of the Superior Court of Los Angeles County, Cynthia Loo, Juvenile Court Referee. Reversed.

Torres & Torres and Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Richard T. Breen, Deputy Attorneys General, for Plaintiff and Respondent.

Jessica C., a minor, appeals from the order of wardship (Welf. & Inst. Code, § 602) entered following a determination that she committed battery (Pen. Code, §§ 242, 243, subd. (a)). She was ordered suitably placed for a maximum theoretical period of confinement of six months.

In this case, we hold the trial court reversibly misapplied the law when it concluded that the right to self-defense did not apply where appellant reasonably feared only an offensive touching and not physical harm.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*In re Dennis B.* (1976) 18 Cal.3d 687), the evidence established that on January 19, 2004, Pauline S., appellant's mother, told appellant that she could not go to a parade because she was on punishment for previous misbehavior. The two argued. Appellant loudly and angrily cursed at Pauline S. to such an extent that appellant foamed at the mouth. Pauline S. was upset and afraid. Believing appellant might be affected by demonic activity, Pauline S. "went to pray over [appellant] to pray to brother Jesus [to] tell the demons to go." At the time, Pauline S. had on her hands some oil which had been "prayed over." Pauline S. "went to touch [appellant] with [Pauline S.'s] hand just as a point of contact." Appellant hit Pauline S. and hit Pauline S.'s hand. Describing this, Pauline S. testified, "[S]he did push at me twice, hit like to get me away. I didn't say she, like, attacked me sort of kind of thing." (*Sic.*)

A police officer who came to the home testified that appellant told him that, "[d]uring the dispute with her mother her mother attempted to anoint her head with oil in order to rebuke the devil out of her. [Pauline S.] continued to attempt to anoint [appellant's] head. [Appellant] stated that [appellant] pushed [Pauline S.'s] hand away each time."

2. *Defense Evidence.*

In defense, appellant, who was 15 years old at the time of the February 2004 adjudication, admitted arguing with Pauline S. but denied appellant was foaming at the

mouth. Appellant testified that while the two were arguing, Pauline S. "tried to anoint my head to rebuke the devil." Appellant did not want Pauline S. to do this because Pauline S. was "pushing to the side what I was trying to get through to her by bringing up Jesus." Appellant testified that when Pauline S. tried to touch appellant's head, appellant hit Pauline S.'s hand "[b]ecause she was trying to put oil on me and it wasn't on the devil." (*Sic.*)

During cross-examination, appellant testified, "She said I rebuke the spirit of whatever that's around you or whatever, and she just was mumbling something. I told her, 'Don't touch me.' Then she just kept coming toward me with the oil, and she put some on my head. And I moved back, and I was hitting her hand." Appellant hit Pauline S.'s hand perhaps two or three times, but appellant was not certain. The following also occurred: "Q So you hit [Pauline S.] two or three times? [¶] A No. [Pauline S.] was touching me. [Pauline S.'s] hand was already on me, and I moved [Pauline S.'s hand] off of me."

During recross-examination, appellant testified that Pauline S. had anointed appellant before, it did not cause appellant great pain, but "[i]t just agitated me." When appellant saw Pauline S. with the oil and thought that Pauline S. was going to anoint appellant, appellant was not afraid that she was going to be injured by the oil.

The following later occurred during recross-examination: "[The Prosecutor]: When you hit [Pauline S.], you were angry? [¶] A I didn't hit [Pauline S.]. [¶] Q When you swung your arm and hit [Pauline S.'s] arm as she was about to anoint you, you were angry at [Pauline S.]? [¶] . . . [¶] [Appellant]: No, I wasn't angry. I was crying. I just -- she was trying to just -- the oil stuff had nothing to do with what we were talking about because God has nothing to do with calling your children ho's and sluts, and he has nothing, no part in that. [¶] By [Pauline S.] anointing me was all beside the point. I felt she was trying to provoke me, so I just pushed [Pauline S.] to the side,

pushed [Pauline S.'s] hand away from me because that has nothing to do with the situation."[1]

CONTENTIONS

Appellant contends: (1) "Appellant's state and federal due process rights were violated when the court misapplied the law concerning her self-defense claim to the battery allegation"; (2) "The juvenile court violated appellant's state and federal constitutional rights when it ordered her not to associate with anyone disapproved of by her parents or probation officer, and to stay away from places where narcotics users congregate"; and (3) "This court should order the February 13, 2004 minute order amended to reflect 26 days predisposition credit."

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[1] Appellant initially denied that Pauline S. had been physical with appellant prior to the present incident. Appellant then testified that Pauline S. physically had disciplined appellant in the past. Appellant subsequently testified that Pauline S. physically had "hurt" appellant more than once before the present incident. During cross-examination, the prosecutor asked appellant to give some of the most recent examples of how Pauline S. previously had hurt appellant physically. Appellant replied that "[t]he last thing I remember is she choked me." The incident occurred during an argument "[m]aybe a month ago." Pauline S. had choked appellant because she would not be quiet. When the prosecutor asked what other incident occurred in which appellant was physically hurt, appellant replied, "All of that is repressed[]" and she did not "want to bring it up." The following occurred during appellant's redirect examination: "[Defense Counsel]: You stated in the past [Pauline S. has] choked you, correct? [¶] A Yes. [¶] . . . [¶] [Defense Counsel]: Were you in fear [Pauline S.] was going to do anything to you when she was approaching you? [¶] A Yes. I thought [Pauline S.] might want me to shut up. [¶] . . . [¶] . . . I know she was angry because I wouldn't be quiet. [¶] [Defense Counsel]: So were you in fear [Pauline S.] was going to physically do anything to you? [¶] A I thought she was, but she didn't. [¶] Q . . . That's why you pushed [Pauline S.'s] hands away from you, correct? [¶] A Yes." Appellant never testified that, at the time of the present incident, she was thinking about the past alleged choking incident, and never testified she thought she might be choked during the present incident. Appellant, in her brief, does not claim that she believed that Pauline S. was trying to touch, or was touching, appellant for any reason other than to anoint her with the oil.

DISCUSSION

The Trial Court Reversibly Misapplied the Law.

1. *Pertinent Facts.*

Based on the present incident, a petition alleged that appellant committed criminal threats (Pen. Code, § 422; count one)[2] and battery (Pen. Code, §§ 242, 243, subd. (a); count two). During argument after the presentation of evidence at the February 2004 adjudication, the court stated, "I think that we all agree that the minor in an attempt to get from being anointed pushed the hand away." (*Sic*.)

The court commented that its legal research "seems to indicate in order for self-defense to apply there needs to be a reasonable person must believe they're about to be *injured.*" (*Sic*.) (Italics added.) The court also commented that it had reviewed cases indicating that "in order for self-defense to be used that there has to be a reasonable belief that the minor is about to suffer *bodily injury*, not just something that's annoying." (Italics added.) The court referred to language in *People v. Mayes* (1968) 262 Cal.App.2d 195, 197 (*Mayes*), which states, "[N]o provocative act which does not amount to . . . attempt to inflict *injury*, and no conduct or words, no matter how offensive or exasperating, are sufficient to justify a battery." (Italics added.)

The court concluded count one had not been proven. As to count two, the court stated, "the court believes that the mother's attempt to anoint the minor did not cause the minor to reasonably be in fear [of] *physical harm*. Therefore, the court is going to sustain count 2, the simple battery." (Italics added.)

2. *Analysis.*

"A battery is any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242.) There is no dispute that (1) appellant committed a

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2 We have omitted facts about count one since they are not pertinent to this appeal.

"willful . . . use of force or violence upon" Pauline S.,[3] and (2) said use was "unlawful" unless appellant acted in self-defense.

CALJIC No. 5.30, correctly states the law of self-defense pertinent to the present case. That instruction states, in pertinent part, "It is lawful for a person who is being assaulted to defend . . . [herself] from attack if, as a reasonable person, . . . [she] has grounds for believing and does believe that *bodily injury* is about to be inflicted upon . . . [her]. In doing so, that person may use all force and means which . . . [she] believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the *injury* which appears to be imminent." (Italics added.)

Appellant, citing *People v. Myers* (1998) 61 Cal.App.4th 328 (*Myers*), claims the right of self-defense permits one to resist an *offensive touching*, and not merely "bodily injury." *Myers* stated that "an offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances. The same may be said of an assault insofar as it is an attempt to commit such a battery." (*People v. Myers*, *supra*, 61 Cal.App.4th at p. 335.) Accordingly, appellant claims the trial court in the present case erred by concluding, according to appellant, that she lacked the right of self-defense because that defense "was only permissible if the defendant was about to suffer a *physical injury*." (Italics added.)

We agree with appellant. We note that *Myers* was approvingly cited in *People v. Robertson* (2004) 34 Cal.4th 156, 167. Moreover, *People v. Colantuono* (1994) 7 Cal.4th 206 (*Colantuono*), is illuminating. There, our Supreme Court, discussing the requisite mental state for assault, stated that an assault is "'an unlawful attempt, coupled with the

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[3] Appellant somewhat inartfully urges, "both *appellant* and [Pauline S.] committed a battery. [Pauline S.] was trying to 'anoint' appellant against her wishes while appellant was pushing away [Pauline S.'s] arm with her hand." (Italics added.) Of course, if appellant is conceding she committed a *battery* (and not merely a "willful . . . use of force or violence upon" Pauline S.), the concession undercuts appellant's contention.

present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery. [Citations.] Accordingly the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being "any willful and unlawful use of force or violence upon the person of another." . . . The intent to . . . *injure in the sense of inflicting bodily harm* [fn. omitted] is not necessary.' [Citations.]" (*Colantuono*, *supra*, 7 Cal.4th at p. 214, italics added.)

The above omitted footnote reads: "'A battery must be contemplated, but only an "injury" as that term is used with respect to a battery need be intended. "It has long been established, both in tort and criminal law, that '*the least touching' may constitute battery*. In other words, *force* against the person is enough, it need not be violent or severe, *it need not cause bodily harm* or even pain, and it need not leave any mark." [Citation.] [¶] "The *'violent injury' here mentioned is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act.*" [Citation.]' [Citation.] Accordingly, references throughout this opinion to 'violent injury' or 'violent-injury-producing' acts should be understood in light of this explication." (*Colantuono*, *supra*, 7 Cal.4th at p. 214, fn. 4, first, third, and fourth italics added.) *Colantuono* later observed, "The evidence must only demonstrate that the defendant willfully or purposefully attempted a 'violent injury' or *'the least touching,'* i.e., 'any wrongful act committed by means of physical force against the person of another.' [Citation.]" (*Colantuono*, *supra*, 7 Cal.4th at p. 214, italics added.)

We believe the same standard applies to self-defense, that is, just as one can commit assault with only the mental state of intending *the least, or an offensive, touching*, or can commit battery by committing *such a touching* (assuming the other elements of those crimes have been satisfied), we believe one has a right to defend oneself from *such* an assault or battery. Accordingly, the trial court erroneously applied too high a standard by concluding that the right of self-defense was inapplicable because appellant reasonably feared merely an offensive touching, and did not reasonably fear physical injury.

Respondent, referring to "the apparent split of authority" presented by *Myers* and *Mayes*, cites *Mayes* in support of respondent's position that appellant had no right of self-defense. Respondent urges *Myers* is distinguishable from the present case because the defendant in *Myers*, unlike appellant, was resisting an assault or battery that was continuing.

We reject respondent's argument. *Mayes* was a pre-*Colantuono* decision and, in any event, was not presented with the issue of whether the concepts of "bodily injury" and "least (or offensive) touching" were distinguishable for purposes of self-defense, or with the issue of whether self-defense applied to a defendant who had a reasonable fear only of a "least (or offensive) touching." Cases are not authority for propositions not considered. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198.) There is no dispute that appellant reasonably feared the "least touching" from her mother. *Myers* did not hold that the right to defend oneself against a criminal assault or battery applied only when that crime was continuing. The trial court reversibly erred by misapplying self-defense doctrine.[4]

DISPOSITION

The order of wardship is reversed.

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CROSKEY, Acting P. J.

We concur:

KITCHING, J. ALDRICH, J.

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[4] In light of our disposition of appellant's first contention, there is no need to reach his remaining ones.